

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT JACKSON

October 9, 2001 Session

DIANA NOLES v. AMERISTEEL CORPORATION

**Direct Appeal from the Circuit Court for Carroll County
Nos. 3979 & 3980 C. Creed McGinley, Judge**

No. W2001-00406-WC-R3-CV - Mailed November 8, 2001; Filed December 19, 2001

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for a detailed analysis of the evidence in the trial record. The trial court in this cause found that Plaintiff sustained a thirty-five percent (35%) permanent partial disability to the right and left arm. Defendant, Ameristeel Corporation, appeals and asserts that the trial court's award of thirty-five percent (35%) permanent partial disability to each arm is excessive and not supported by a preponderance of the evidence. From our review of the entire record and applicable law, the judgment of the trial court is affirmed as modified.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Circuit Court is Affirmed as Modified.

L. TERRY LAFFERTY, SR. J., delivered the opinion of the court, in which JOE C. LOSER, JR., SP. J., and JANICE M. HOLDER, J., joined.

John D. Burlison and L. Beth Williams, Jackson, Tennessee, for the appellant, Ameristeel Corporation.

Paul Todd Nicks, Jackson, Tennessee, for the appellee, Diana Noles.

MEMORANDUM OPINION

Diana Noles (Parker), age 43, a high school graduate, testified that she has a varied employment background since high school. Plaintiff has worked as an office employee as well as performing manual labor in factories. Prior to 1993, she lived in Addison, Illinois, and moved to Tennessee that year with her ex-husband.¹ Prior to her employment with MRT and Defendant, who

¹The Plaintiff was a single mother up and until her marriage three months prior to trial.

took over MRT, Plaintiff worked for Johnson Controls in Lexington, Tennessee, testing seat tracks for cars. When Plaintiff went to work for MRT, she was a “B” operator. This work consisted of shoveling, squeegeeing off the floor, pulling samples, and driving a forklift and front end loader. She became an “A” operator in the control room, but when Defendant took over MRT, she was transferred back to a “B” operator. Plaintiff’s primary work responsibility was to keep the seal pans clean, unload coal trucks, fill charge buckets, and shovel and hoe out the seal pans which would accumulate mud. Also, this cleaning process required the use of a three-inch vacuum hose. Twenty-five percent (25%) of her work consisted of this repetitive shoveling, hoeing and vacuuming of the seal pans. Prior to February of 1999, Plaintiff had no work-related injuries.

In January 1999, she advised her supervisors that her right arm felt like dead weight and was numb. She saw her family doctor who advised her that she may have carpal tunnel and to advise her employer. The company sent her to see Dr. Kenneth Warren, who referred her to Dr. Ronald Bingham for carpal tunnel testing. As a result of the test, Dr. Warren referred Plaintiff to Dr. Claiborne Christian for carpal tunnel syndrome. Eventually, Dr. Christian performed surgery on her right arm on Friday, February 26, 1999. She returned to light duty the following Monday and remained on light duty for six weeks. During this six weeks, Plaintiff was still seeing Dr. Christian every couple of weeks until she was returned to full duty. Her shoulder pain and numbness went away after surgery. Plaintiff testified that in June 1999, she began developing numbness and pain in her left hand. The company referred her back to Dr. Christian. After seeing Dr. Christian a number of times and having another test, Dr. Christian performed surgery on her left hand. Plaintiff returned to full duty in April 2000. Since both surgeries, Plaintiff testified that she has re-occurring numbness/tingling, more in the right hand than the left. The numbness has affected her work and home chores in that while performing shoveling or vacuuming, she must stop and rest. She has not complained to her supervisors, as she does not want to sound “whiny.”

On behalf of Defendant, Mr. Jimmy Sloop, plant superintendent, testified that Plaintiff is one of his best employees. She does a good job, does not complain and approximately twenty-five percent (25%) of her work is repetitive. He would be happy to recommend her for an “A” operator position, but there are no openings and none seem to be available in the immediate future. Mr. Sloop confirmed that Plaintiff worked a twelve-hour shift, three days a week and averaged 1.3 hours of overtime daily.

MEDICAL EVIDENCE

Plaintiff was seen, initially, by Dr. Warren on February 9, 1999, who referred her to Dr. Bingham for a nerve conduction test. As a result of the test indicating severe entrapment neuropathy of the median nerve in right wrist, Dr. Warren referred Plaintiff to Dr. Christian for possible carpal tunnel release.

Dr. Christian, an orthopedic specialist, filed a C-32, Department of Labor Standard Form Medical Report for Industrial Injuries on October 16, 2000. Utilizing the AMA Guidelines for evaluation of permanent impairment, Dr. Christian opined that Plaintiff sustained a two percent (2%)

permanent impairment to the right upper extremity and a two percent (2%) permanent impairment to the left upper extremity. Dr. Christian began Plaintiff's treatment in February 1999, upon a referral from Dr. Warren for possible carpal tunnel syndrome. A previous nerve conduction study indicated a severe motor and sensory involvement of her median nerve with carpal tunnel syndrome. After discussing in detail this problem with Plaintiff, Dr. Christian recommended carpal tunnel release. Plaintiff agreed. On Friday, February 26, 1999, Dr. Christian performed carpal tunnel release on Plaintiff's right hand. On the following Monday, Plaintiff returned to work on light duty. Dr. Christian examined Plaintiff four times between March 1, 1999 and April 27, 1999, and believed she was doing well, although she complained of discomfort in her right hand and palm. Dr. Christian returned Plaintiff to full work duty on April 27, with no restrictions. Dr. Christian examined Plaintiff on May 25 and June 24, 1999. Plaintiff advised Dr. Christian that she still had discomfort and some difficulty on the job. On June 24, 1999, Dr. Christian opined that Plaintiff reached maximum medical improvement and based upon continued subjective complaints, Plaintiff sustained a two percent (2%) permanent impairment to the upper right extremity. Plaintiff should have no long term restrictions.

Dr. Christian saw Plaintiff on July 15, 1999, when she complained of pain in her left hand beginning in June 1999. A physical examination indicated a positive Tinel's and positive Phalen's test with no atrophy. Plaintiff was sent to Dr. Bingham for an EMG, nerve conduction test. The EMG indicated that Plaintiff had early median neuropathy on the left. On September 27, 1999, Dr. Christian determined that Plaintiff had possible carpal tunnel syndrome to the left and that Plaintiff may need surgery. After conservative treatment, on January 24, 2000, Dr. Christian opined that Plaintiff had progressed to carpal tunnel syndrome. As of February 14, Plaintiff had not responded to treatment and on Friday, March 10, 2000, Dr. Christian performed carpal tunnel release on Plaintiff. As before, Plaintiff returned to work on light duty the following Monday. Between March 13 and May 23, 2000, Dr. Christian examined Plaintiff four times. Plaintiff did reasonably well, but still had some occasional problems with pain, numbness and tingling in her left hand. Plaintiff is doing her regular job. Dr. Christian stated: "I believe she had a good operative release at the time. She is certainly better than she was preoperatively, but if she chooses to go back and do the job that caused the problem in the first place, then the consequence of that will be the possibility of continued subjective complaints as we discussed prior to the surgical release." Dr. Christian opined that Plaintiff reached MMI and sustained a two percent (2%) permanent partial impairment to the left upper extremity. Plaintiff had no restrictions.

At the request of counsel, on November 29, 1999, Dr. Joseph C. Boals, III, an orthopedic specialist, examined Plaintiff for bilateral wrist pain. After reviewing Plaintiff's work, medical history and completing a physical examination, Dr. Boals opined that Plaintiff suffered from residuals from right carpal tunnel release and ongoing, mild carpal tunnel syndrome, left. Utilizing Table 34, page 65 of the AMA Guides, Dr. Boals opined that Plaintiff has an impairment of ten percent (10%) to the right upper extremity. According to Table 16, page 57 of the AMA Guides, Plaintiff would qualify for a ten percent (10%) impairment to the left upper extremity. Plaintiff should avoid repetitive work and heavy gripping in the future.

On August 15, 2000, Dr. Boals, again re-examined Plaintiff following surgery to her left hand. Plaintiff complained of numbness returning to her hands. Dr. Boals opined that Plaintiff had a ten percent (10%) impairment of the left upper extremity based upon her surgery. Plaintiff has anatomic change from surgery and is supported by her grip strength loss. Plaintiff should avoid repetitive work and heavy gripping in the future.

LEGAL ANALYSIS

Defendant asserts that the trial court's award of thirty-five percent (35%) permanent partial disability is excessive and preponderates against the evidence. Defendant contends that this Court, under its reviewing authority of medical evidence, should give greater weight to that of Dr. Christian, the treating physician. *See Crossno v. Publix Shirt Factory*, 814 S.W.2d 730 (Tenn. 1991). Furthermore, Plaintiff's vocational disability as a result of this injury is minimal, if any.

Appellate review of findings of fact is *de novo* upon the record of the trial court accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). This standard requires this Panel to conduct an independent examination of the record to determine where the preponderance lies. *Story v. Legion, Ins. Co.*, 3 S.W.3d 450, 451 (Tenn. Sp. Workers Comp. 1999); *Galloway v. Memphis Drum Service*, 822 S.W.2d 584, 586 (Tenn. 1991). Where the trial court has seen and heard the witnesses, especially where issues of credibility are involved, a reviewing court must give considerable deference to the trial court's findings. *Ferrell v. Cigna Property & Cas. Ins. Co.*, 33 S.W.3d 731, 734 (Tenn. 2000). No such deference is warranted in reviewing documentary proof. *Wells v. Tennessee Bd. of Regents*, 9 S.W.3d 779, 783-84 (Tenn. 1999). Although the medical evidence in this record is not contained in depositions, this Court is in just as good a position as the trial court to judge the credibility of the medical experts. *Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn. 1997); *Elmore v. Travelers Ins. Co.*, 824 S.W.2d 541, 544 (Tenn. 1992). However, the extent of vocational disability is a question of fact to be determined from all of the evidence, including lay and expert testimony, if any. *Story*, 3 S.W.3d at 456; *Worthington v. Modine Mfg. Co.*, 798 S.W.2d 232, 234 (Tenn. 1990).

When medical testimony may differ, it is within the discretion of the trial court to determine which expert testimony to accept. *Kellerman v. Food Lion, Inc.*, 929 S.W.2d 333, 335 (Tenn. Sp. Workers Comp. 1996); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804 (Tenn. 1990). The medical expert proof in this record consists of the C-32 Standard Form Medical Report of Dr. Claibourne Christian, the reports of findings of Dr. Joseph Boals, III. The trial court found in its findings, that Dr. Christian had assessed a two percent (2%) impairment to Plaintiff's right and left upper extremities, although Dr. Boals believed Plaintiff incurred an impairment of ten percent (10%) to each upper extremity.

The extent of an injured worker's disability is an issue of fact. *Jaske v. Murray Ohio Mfg. Co., Inc.*, 750 S.W.2d 150, 151 (Tenn. 1988). Likewise, in assessing the extent of an employee's vocational disability, the trial court may consider the employee's skills and training, education, age,

local job opportunities, anatomical impairment rating, and the employee's capacity to work at the kinds of employment available in the employee's disabled condition. The employee's own assessment of his or her physical condition cannot be disregarded. The trial court is not bound to accept physicians' opinions regarding the extent of Plaintiff's disability, but should consider all the evidence, both expert and lay testimony, to decide the extent of an employee's disability. *Walker v. Saturn Corp.*, 986 S.W.2d 204, 208 (Tenn. 1998).

In reviewing the trial court's decision, the trial court commented on Plaintiff being a bright and articulate person, with a great deal of candor and credibility. The trial evidence finds Plaintiff is a good employee, which was corroborated by other testimony. Likewise, the trial court commented on Plaintiff's long employment history, and has developed experience from supervisory skills, quality control and manual labor. Plaintiff sustained compensable injuries in the course of employment which worsened to the requirement of surgery. It is obvious the trial court was impressed that Plaintiff elected to have surgery over a weekend to minimize her loss of work. The trial court found, as to vocational disability, "Plaintiff's disability is not as bad as some carpal tunnel, apparently a reasonable good result, although it might be a little worse now than it was immediately after the surgery, but it's not as debilitating as some cases that the Court's had the opportunity to evaluate." In conclusion, the trial court found that the evidence supports a vocational disability of thirty-five (35%) impairment to each arm. From our independent review of the record, and consideration of applicable law, we cannot say that the evidence preponderates against the trial court's finding as to the extent of Plaintiff's permanent disability.

CONCLUSION

From our independent review of the entire record, we find the evidence does not preponderate against the findings of the trial court that Plaintiff suffered a thirty-five percent (35%) permanent partial disability to each arm. We note, however, that the assessment should have been made under Tennessee Code Annotated § 50-6-207(3)(A)(ii)(w) for the loss of two arms rather than making separate awards for each arm. Therefore, we modify the award of thirty-five percent (35%) permanent partial disability to both arms which will neither increase or decrease the award but will conform the trial court's judgment to the statute. Costs are taxed to the Appellant.

L. TERRY LAFFERTY, SENIOR JUDGE

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JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs on appeal are taxed to the Appellant, Ameristeel Corporation, for which execution may issue if necessary.

IT IS SO ORDERED.

PER CURIAM